STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2009
v	No. 283456 Kent Circuit Court
WALTER JAMES JENKINS, III, Defendant-Appellant.	LC No. 06-004901-FH

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant Walter Jenkins, III appeals as of right his convictions of one count of third-degree criminal sexual conduct (CSC III), sexual penetration while knowing or having reason to know that the victim was mentally incapable, MCL 750.520d(1)(c), and one count of CSC III using force or coercion to accomplish the sexual penetration, MCL 750.520d(1)(b). We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict with regard to the charge brought under MCL 750.520d(1)(b), because the evidence was insufficient to prove that he used force or coercion. Defendant moved for a directed verdict based on the sufficiency of the evidence as to this charge, thereby preserving this issue for appeal. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Id.* at 122-123.

A person is guilty of CSC III, under MCL 750.520d(1)(b), if the person engages in sexual penetration with another person and if force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to, (1) when the actor overcomes the victim through the actual application of physical force or physical violence; and (2) when the actor coerces the victim to submit by threatening to use force or violence on the victim or when the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. MCL 750.520b(1)(f). "[T]he existence of force or coercion is to be determined in light of the totality of the circumstances and is not limited to acts of physical violence." *People v Premo*, 213 Mich App 406, 411; 540 NW2d 715 (1995). Even when none of the circumstances defined as force or coercion in MCL 750.520b(1)(f) are present, "force or coercion may be found where

the defendant's actions were sufficient to create a reasonable fear of dangerous consequences." *People v Patterson*, 428 Mich 502, 516; 410 NW2d 733 (1987), quoting *People v McGill*, 131 Mich App 465, 472; 346 NW2d 572 (1984).

Viewing the evidence in a light most favorable to the prosecution, defendant grabbed the victim's head and forced her to perform fellatio. He hit her, choked her, and threatened to hurt her. He performed cunnilingus on the victim, digitally penetrated her, and engaged in penile/vaginal intercourse with her. She told him to stop but he did not. In addition, defendant knew or should have known that the victim, although age 18 at the time of the incident, had the mental capacity of a 7 or 8-year-old. The evidence was sufficient to prove that defendant actually applied force against the victim, threatened to use force against her, and created a "reasonable fear of dangerous consequences" in the mind of the victim in order to accomplish the sexual penetration. Although some contradictory evidence was presented, the jury was the trier of fact which was charged with determining questions of fact and assessing the credibility of witnesses. *Aldrich, supra* at 124. Viewing the evidence in the light most favorable to the nonmovant, the evidence was sufficient to support defendant's conviction, and the trial court properly denied defendant's motion for a directed verdict.

Second, defendant argues that the trial court's handling of the recorded interview of defendant and his father, which was played for the jury, violated both the ban on hearsay and the Sixth Amendment's Confrontation Clause.

We review defendant's preserved challenge on hearsay grounds for an abuse of discretion. *Aldrich, supra* at 113. The unpreserved Confrontation Clause issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Yost*, 278 Mich App 341, 363-364; 749 NW2d 753 (2008). Although the jury heard defendant's father's statements because they could not be redacted from the recording without making the interview incomprehensible, the trial court instructed the jury that defendant's father's comments were not evidence; only defendant's statements were evidence to be considered by them. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Further, the prosecution did not offer the father's statements to prove the truth of the matter. The statements were included only to give context to defendant's statements and the interview as a whole. The prosecution properly offered defendant's statements as evidence. Because the father's statements were not offered to prove the truth of the matters asserted therein, they were not hearsay.

Additionally, allowing the jury to hear the father's statements did not violate defendant's right to confront the witnesses against him. The Confrontation Clause prohibits the admission of all out-of-court testimonial statements used to prove the truth of the matters asserted unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). The father's statements were not used to prove the truth of the matters asserted therein and, therefore, there was no Confrontation Clause violation. *Id.* (The Confrontation Clause does not bar the use of out-of-court statements for other purposes). See also *People v Hill*, 282 Mich App 538, ___;

NW2d ___ (2009), lv pending (Where the challenged evidence was not admitted into evidence and was not used for its truth, there was no violation of the right to confrontation).

Third, defendant argues that the trial court abused its discretion when it allowed a school psychologist to testify as to the results of an I.Q. test that was administered to the victim almost three years before the incident giving rise to the criminal charges because the I.Q. test was too old to be relevant or reliable. We review a trial court's decision to admit evidence for an abuse of discretion. *Aldrich*, *supra* at 113.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 incorporates the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46, 781; 685 NW2d 391 (2004). A trial court "may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Id.* at 782.

Defendant's argument on appeal does not address any violation of *Daubert* or the trial court's decisions regarding whether the testimony was based on sufficient facts or data, the testimony was the product of reliable principles or methods, or whether the witnesses's application of the principles and methods was reliable. Rather, defendant's argument is that the evidence was irrelevant, i.e. was too old to assist the trier of fact to understand the case or determine a fact in issue, particularly the victim's mental abilities. We disagree.

Defendant was charged with CSC III, under MCL 750.5201(d)(c), which provides that a person is guilty if the perpetrator engages in sexual penetration with another person while knowing or having reason to know that the victim was mentally incapable. MCL 750.520a(h) defines "mentally incapable" as suffering "from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." At the *Daubert* hearing, Linola Chamberlain, testified that as a school psychologist she evaluated students to determine their academic, intellectual abilities, and social abilities. Chamberlain evaluated the victim in 2003 when she was age 15, and found that she functioned at the level of a 7 or 8 year old. Although the victim had made some progress over time, her progress was very slow and she would probably remain at an I.Q. of around 47 or 48 her entire life because her 2003 results were consistent with previous evaluation results. Chamberlain testified that impaired students are reevaluated every three years. The trial court found that the evidence of the victim's I.Q. would assist the jury in determining whether the victim was capable of "appraising the nature of her conduct." Defendant's argument that the 2003 results were too old to be relevant is without merit. The acts in this case took place in January 2006; the 2003 evaluation was the most current. Given that the victim was evaluated in three-year increments

and her results were consistent over time, we do not find the evaluation testimony irrelevant. Defendant's claim that the results were too old affects the weight of the evidence, not its admissibility. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). The trial court was well within its discretion in finding that the school psychologist's opinion was relevant under MRE 702. Moreover, although not raised by defendant on appeal, we have reviewed the admission of the evidence under MRE 702, and the trial court's decision that it was reliable and admissible was not an abuse of discretion.

Fourth, defendant argues that the trial court erred in excluding evidence of the victim's sexual contact with another young man, not defendant. We review a trial court's decision to admit evidence for an abuse of discretion, *Aldrich*, *supra* at 113, and we review preliminary issues of law de novo, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The rape-shield statute, MCL 750.520j, generally excludes evidence of the victim's sexual activity with persons other than defendant. *People v Hackett*, 421 Mich 338, 345; 365 NW2d 120 (1984). However, the statute allows the admission of specific instances of sexual activity in order to show the source or origin of semen, pregnancy, or disease. MCL 750.520j(1)(b). We have also held that the rape-shield statute does not bar the admission of specific instances of sexual activity used to show "the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value." *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978). Before evidence of the victim's unrelated sexual activity is admissible, the defendant must make an offer of proof showing the existence of the proposed evidence and its relevance to the purpose for which it is sought to be admitted. *Hackett, supra* at 349-350. If the defendant makes such a showing, the trial court must then conduct an evidentiary hearing to determine the admissibility of such evidence. *Id.* at 350. In the absence of such a showing, the motion must be denied. *Id.*

The prosecution presented medical testimony that the victim had a vaginal injury in order to circumstantially prove that defendant vaginally penetrated the victim. Defense counsel moved to admit evidence that the victim was involved in sexual activity with another man, not defendant, on Dunham Street after the alleged incident giving rise to the charges against defendant. He wanted this evidence admitted in order to provide an alternative explanation for the source of the victim's vaginal injury. Assessing without deciding the trial court incorrectly held that MCL 750.520j precluded admission of the evidence, Defense counsel's alleged evidence falls into the exception recognized by this Court in *Mikula, supra.* The Defendant's argument nevertheless fails because he did not make the required offer of proof. The record shows that a young man at the house on Dunham Street committed a sexual touching offense against the victim. There was no showing that the young man on Dunham Street vaginally penetrated the victim or attempted to vaginally penetrate the victim. Because there was no evidence that the young man on Dunham Street was or could have been the cause of the vaginal injury, the motion to admit evidence of the Dunham Street incident was properly denied. We affirm the trial court's decision to exclude the evidence albeit on a different ground. See *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

Finally, defendant argues that his comments about the Dunham Street incident in the recorded interview should have been played for the jury pursuant to MRE 106.

MRE 106 states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

"MRE 106 does not automatically permit an adverse party to introduce into evidence the rest of a document once the other party mentions a portion of it. Rather, MRE 106 logically limits the supplemental evidence to evidence that 'ought in fairness to be considered contemporaneously with it.'" *People v Herndon*, 246 Mich App 371, 412 n 85; 633 NW2d 376 (2001).

Defendant made comments regarding the Dunham Street incident during his interview with police. These comments were not necessary to understand the context of the portion of the interview that was played for the jury related to the incident giving rise to the charges against defendant, and were irrelevant because defendant had no personal knowledge of what happened on Dunham Street. MRE 602; MRE 401. In addition, as stated above, the record shows that the young man on Dunham Street only committed a touching offense. Evidence of a touching offense was irrelevant to prove that someone else was the source of the victim's vaginal injury. Irrelevant evidence is not evidence "that ought in fairness to be considered contemporaneously" with the rest of defendant's interview. *Herndon, supra.* Thus, we hold that the trial court did not abuse its discretion in refusing to allow the playing of the rest of the recorded interview.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood